

Edward W. Swanson, SBN 159859
August Gugelmann, SBN 240544
SWANSON & McNAMARA LLP
300 Montgomery Street, Suite 1100
San Francisco, California 94104
Telephone: (415) 477-3800
Facsimile: (415) 477-9010

Court Expert

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

V.

GAVIN NEWSOM, et al.,

Defendants.

Case No. CV 94-2307 CW

COURT EXPERT'S QUARTERLY REPORT ON INVESTIGATIONS AND DISCIPLINE

Pursuant to the Court’s orders for remedial measures at RJD, LAC, COR, SATF, CIW, and KVSP (the “*Armstrong six*” prisons), the Court Expert provides the following report on implementation of CDCR’s new investigations and discipline system.

Investigation timelines

Under the remedial plans, investigations assigned to custody supervisors (sergeants and lieutenants) must be completed in 120 days, while cases assigned to special agents must be completed in 180 days. In his last report, the Court Expert expressed concerned that a significant number of investigations were missing those deadlines. There has been some improvement on this front. Only 39% of cases received by AIU in June 2022 closed on time; for November 2022, the percentage has risen to almost 65%. However, 22.5% of cases received that month either

1 closed after the deadline or remain open and past due (the remaining investigations are open and
 2 have not yet reached their deadlines).¹

3 The parties' discussions on this issue have also revealed a new concern as it relates to
 4 timeliness. While the remedial plans set timelines for investigations, the investigation is only the
 5 first step in the process—imposition of discipline still remains. Subject to certain exceptions, by
 6 statute CDCR has one year from discovery of an allegation to both “complete its investigation”
 7 and to “notify the public safety officer of its proposed discipline.” Gov. Code § 3304(d). The
 8 statute of limitations for non-peace officer staff is three years. Gov. Code § 19635. This means
 9 that even if an AIU sergeant completes her investigation in 120 days, it could still take an
 10 additional eight months before the notice of proposed discipline is sent, and of course longer
 11 after that for discipline finally to be imposed. That appears to be what is happening. Data from
 12 CDCR shows that AIU completed 1,561 investigations as of March 22, 2023, but wardens had
 13 yet to act on 81% of them—1,268 cases remain pending.²

14 Implementing a quick but thorough investigations and discipline process serves two
 15 goals: it protects the integrity of investigations by minimizing the risk of fading memories and
 16 lost evidence, and it ensures prompt resolution for both the accused officer and the affected
 17 complainant. A system in which investigations are timely but imposition of discipline lags
 18 achieves only the first of those goals. In addition, the remedial plans allow wardens to reopen
 19 investigations they deem incomplete. *See* Remedial Plan, 6 (“If the hiring authority finds the
 20 investigation biased or not comprehensive the hiring authority can request further
 21 investigation.”). If the warden waits until the eve of the statutory deadline to review the file, the
 22 opportunity for follow-up investigation could be lost. The Court Expert is concerned that long
 23 delays after completion of investigations could undermine the goals of the reforms the parties
 24 have agreed upon and the Court has implemented, and he will continue to discuss this issue with

25
 26 ¹ Investigation deadlines may be extended for “extenuating circumstances,” which must be
 27 documented in writing. *See* Dkt. 3393 (Remedial Plan) at 5. The Court Expert does not have
 information on how many of the investigations that appear past due fall under this provision.

28 ² Of the cases that have been decided, allegations were sustained in 24 cases (1.5% of total cases
 investigated) and not sustained in 269 (17.2% of total cases).

1 the parties. This is a problem that must be remedied for the new investigation and discipline
 2 process to be effective.

3 **Investigator caseloads**

4 CDCR provides the Plaintiffs and the Court Expert quarterly data on the number of
 5 complaints generated at the six institutions subject to the Court's remedial orders. The most
 6 recent data shows that the number of complaints filed is roughly consistent month over month,
 7 with almost 3,200 complaints filed from the Armstrong six prisons in February 2023. Complaints
 8 alleging forms of staff misconduct listed on the ADI are routed by the Centralized Screening
 9 Team (CST) to the AIU for investigation; those that allege less serious forms of staff misconduct
 10 are sent to Locally Designated Investigators (LDIs) for investigation at the institution. The
 11 percentage of complaints sent to AIU has increased over time. In February, CST sent nearly 13%
 12 of complaints to the AIU, up from approximately 9% in June 2022.³

13 The Court Expert remains concerned about the number of cases being routed to AIU and
 14 the investigators' capacity to handle the workload. As noted in the Court Expert's earlier reports,
 15 CDCR's initial estimate was that AIU would be receiving 505 cases per month. In February,
 16 AIU received 404 cases from the six *Armstrong* prisons alone. The Court Expert does not have
 17 data on the number of additional cases coming into AIU from prisons not subject to the Court's
 18 remedial orders, but as of March 1, 2023, complaints made via Form 602-1 at all prisons are
 19 being routed to AIU, and complaints initiated through other processes will be sent to AIU in
 20 phases over the course of this year. Given that only 17% of the state's prisons are subject to the
 21 Court's orders, the fact that those institutions are already generating 80% of the projected case
 22 volume indicates that AIU may struggle to effectively manage its caseload.

23
 24
 25
 26
 27
 28 ³ A complaint may raise multiple claims; accordingly, the number of complaints alleging staff
 misconduct is smaller than the number of claims of staff misconduct.

1 **Shortcomings in investigations and discipline**

2 The Court ordered CDCR to make quarterly productions of information related to closed
 3 investigations. Based on their review of that information, Plaintiffs have continued to raise
 4 concerns with individual investigations and disciplinary decisions. The Court Expert shares
 5 many, although not all, of Plaintiffs' concerns. The information produced by CDCR includes
 6 instances of clear staff misconduct, including unauthorized or excessive uses of force, that were
 7 either not disciplined or not disciplined adequately. In some cases there were shortcomings in the
 8 investigations; in some the Court Expert disagrees with the warden's disciplinary decisions; and
 9 in some the problems lay with both the investigation and the discipline.

10 CDCR has pointed out that, because of the pace of document production, the majority of
 11 these complaints were investigated under legacy processes, before implementation of the
 12 remedial plans. While investigations that took place prior to implementation of the new
 13 processes are not directly relevant to the Court's orders, the same individuals who conducted
 14 investigations and made disciplinary decisions before will continue to do so now. CDCR should
 15 take the opportunity to identify problems and seek to address them, regardless of when the
 16 investigation occurred.

17 More importantly, CDCR has also acknowledged errors in the disciplinary decisions in
 18 some of the cases flagged by Plaintiffs. It has also provided training in de-escalation and use of
 19 force to some of the officers identified by Plaintiffs as having been involved in staff misconduct.
 20 The Court Expert is encouraged that CDCR has indicated a willingness to acknowledge and seek
 21 to remedy shortcomings. The Court Expert will be working with the parties to develop a
 22 methodology for reviewing individual cases in a manner that will allow the parties to reach
 23 agreement on shortcomings and craft solutions.

24 The Court Expert noted in his prior report that investigators have at times at times failed
 25 to timely seek BWC and/or AVSS footage, making investigation of misconduct complaints far
 26 more difficult. CDCR has now implemented a requirement that AIU investigators triage
 27 incoming cases and submit requests for preservation of relevant footage within 10 days. It is in
 28 the process of implementing the same requirement for LDIs, the investigators at the institutions

1 who handle cases that allege less serious forms of staff misconduct. We will monitor this new
2 policy closely to ensure that BWC footage is not being lost due to delays in requesting
3 preservation.

4 Finally, Plaintiffs have noted instances where officers deactivated BWCs contrary to
5 policy or, worse, at times were it appears there might have been an intentional effort to thwart
6 recording. CDCR agreed that Plaintiffs identified compliance problems in some cases and has
7 provided additional training on BWC activation for the officers at issue. We will also be focusing
8 on BWC policies in the upcoming quarter.

9 Dated: March 31, 2023

10 Respectfully submitted,

11 
12 Edward W. Swanson
13 SWANSON & McNAMARA LLP

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28